Supreme Court, U. S.
FILED
OCT 8 1980
MICHAEL RODAK, JR., CLERK

No. 80-385

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

DR. ALAN SHAW,

Petitioner,

v.

THE HOSPITAL AUTHORITY OF COBB COUNTY, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

The petition for certiorari sets out accurately some of the questions presented for review but for purposes of accuracy and amplification Respondents supplement those questions as follows:

1. Does a discipline of limited health care practitioners who are licensed by a state enjoy a substantive constitutional right to practice their discipline in a public hospital merely by virtue of licensure?

2. Did the medical staff of Cobb General Hospital and the Hospital Authority of Cobb County conduct procedural due process hearings comporting with the Appellate Mandate in *Shaw v. Hospital Authority of Cobb County,* 507 F.2d 625 (1975), (Shaw I) and base its decision to exclude the discipline of podiatry upon credible evidence rationally related to the operation of the hospital?

3. Was the decision of the Fifth Circuit Court of Appeals in Shaw I, supra, dispositive of petitioner's equal protection claim by virtue of the doctrine of the law of the case?

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OPINION BELOW

The opinion below, delivered on the 31st day of March, 1980, is appended to the Petition for a Writ of Certiorari.

JURISDICTION

Respondents do not question the jurisdiction as set forth in the Petition.

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct. However, for further clarity, respondents supplement the statement of the case as follows:

Defendants are the Hospital Authority of Cobb County, and its individual members, appointed by the governing authority of Cobb County, pursuant to law, and they administer and supervise the functions of Cobb General Hospital, a tax supported public hospital constructed with state and federal funds. State and federal funds are used in the operation of the hospital.

The Authority's bylaws presently provide that only Doctors of Medicine and Doctors of Osteopathy, both being licensed by the Composite Board of Medical Examiners, and Doctors of Dentistry, may be granted staff privileges at Cobb General Hospital. There is no provision in the bylaws for granting privileges or staff membership to Doctors of Podiatric Medicine who are licensed by the State Board of Podiatric Examiners, or to any other practitioner holding a limited license or licensed by a board other than the Composite Board of Medical Examiners.

The Hospital is accredited by the Joint Commission on Accreditation of Hospitals, the national accrediting agency for hospitals. Joint Commission standards contain provisions for granting privileges in hospitals to podiatrists but make the granting of privileges entirely discretionary with the individual hospitals. Failure to admit podiatrists does not affect accreditation.

On July 17, 1975, Shaw appeared with his attorney at a hearing of the Staff specially set for consideration of his request that the bylaws be amended to make it possible for podiatrists to be admitted to the staff. This hearing was held to comply with the Mandate of the Fifth Circuit Court of Appeals in Shaw I, supra, and extensive discussion occurred at the hearing. The matter was thereafter referred to a special study committee of the staff which recommended that the requested changes not be approved and that no department of podiatry or podiatric service be created at Cobb General Hospital. The staff itself adopted this recommendation by a divided vote. Shaw was furnished written reasons for the staff decision.

On February 4, 1976, Dr. Shaw appeared with his counsel before the Authority for a hearing specially set to consider his proposed bylaw changes. A three hour hearing was held, during which Dr. Shaw and his counsel presented his claim. The Authority members actively participated in the hearing by reviewing materials submitted by Dr. Shaw and questioning him concerning podiatry in general and his proposed amendments.

At both hearings, Dr. Shaw was not only afforded an opportunity to be heard, but the hearings were set at times convenient for him, and he accepted the right to appear personally with his counsel and to present extensive evidence and cross examine witnesses and to answer questions propounded by members of both bodies.

A podiatrist does not come within the definition of "full practice physicians." Ga. Code Ann. §84-601 defines "podiatry" as "diagnosis, medical, surgical, mechanical, manipulative and electrical treatment . . . of the human foot and leg" and states that "no podiatrist shall do any amputation or use any anesthetic other than local." Thus podiatrists do not hold full-practice licenses since under Ga. Code Ann. §84-901, the "practice of medicine" is not defined as limited to any area of the body.

Additionally, petitioners assertion that the hospital authority "never made any determination or conclusion concerning the petitioner's qualifications to perform the requested procedures" is not entirely correct, since one of the findings of the Authority following the hearing was that "the services that would be provided by podiatrists are already being provided by staff physicians who have unlimited license to practice medicine; have more extensive training than podiatrists and can care for the total needs of their patients." The inference of this finding is that Dr. Shaw, or any podiatrist, possesses inferior qualifications to those possessed by the existing staff of orthopedic and general surgeons.

ARGUMENT

I

Petitioner in this case seeks to drastically rewrite constitutional doctrine in the area of professional or occupational pursuits by urging this Court to recognize a substantive fundamental constitutional right to practice medicine or a related discipline in a public hospital.

Under petitioner's expanded view of constitutional law in this area, licensure by a State Board would become virtual investure to medical staff membership at any public hospital. No court in the United States has recognized such an expanded interpretation of the medical practitioner's rights or the certifying board's role.

There can be no question that licensure to practice a profession carries with it a "liberty interest" of some dimension. *Board of Regents v. Roth,* 408 U.S. 546, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1975); *Shaw v. Hospital Authority of Cobb County,* 507 F.2d 625 (1975). However, all courts have recognized the traditional responsibility of local governing boards to govern their hospitals, if pursued reasonably and responsibly.

In *Foster v. Mobile County Hospital Board,* 398 F.2d 227 (1965), the Fifth Circuit held that staff appointments may be constitutionally refused if the refusal is based upon any reasonable grounds, such as the professional or ethical qualifications of the physician or the common good of the public and the hospital. "The subjectives of selection simply cannot be minutely codified. The governing body of a hospital must therefore be given great latitude in prescribing the necessary qualifications for potential applicants." *Foster v. Mobile County Hospital Board,* supra.

A list of surgical procedures and services desired to be performed by the petitioner was submitted to the Staff and Authority in the within case. The Hospital had chosen to grant privileges to perform those procedures to physicians and surgeons holding full unrestricted licenses to practice medicine. The training, license to practice, and scope of practice of a full practice physician licensed by the Composite State Board of Medical Examiners is different from that of a podiatrist who is licensed by the State Board of Podiatry Examiners and whose license covers only the restricted area of the foot and ankle.

This Court has held that a doctor has no constitutional right to staff privileges of a hospital merely because he is licensed to practice. *Hayman v. Galveston,* 273 U.S. 414 (1927). Podiatrists fail to meet the requirements for general surgical privileges or orthopedic surgery privileges as set by the Hospital Authority and the staff,[1] although the procedures they would seek to perform are the same as would be performed by an orthopedic surgeon. To obtain such full surgical privileges or orthopedic surgical privileges requires more training than podiatrists are required to have[2] and requires different licenses from the State of Georgia. There is no unconditional right to privileges if the Hospital Authority chooses to exact additional standards reasonably related to the operation of the hospital. *Davidson v. Youngstown Hospital Association,* 19 Ohio App. 2d 246, 250 N.E.2d 892 (1969).

The *Davidson* case, supra, concerned the admission of podiatrists to staff privileges, and the Court held that it could not find that the hospital had acted arbitrarily, unreasonably, or capriciously in refusing them hospital privileges. This case was cited as authority by the Federal Court in the case of *Sosa v. Board of Managers of Val Verde Memorial Hospital,* 437 F.2d 173 (1971), a case in which the Fifth Circuit Court of Appeals held that the governing board of a hospital must be given great latitude in prescribing the

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[1]Surgical privileges at Cobb General Hospital requires "board certification" or "board eligibility" of the physician seeking surgical privileges. Orthopedic and general surgery certifying boards require one year of internship and four years of residency. See excerpt from Cobb General Hospital Rules and Regulations of the Department of Surgery-Anesthesiology which have been produced at page 1a of the Appendix.

[2]Petitioner testified that there is no "internship" in podiatric training.

necessary qualifications for potential applications to the staff, but emphasized that in exercising its broad discretion it could refuse such applicants only for matters reasonably related to the operation of the hospital. The decision also indicated the restraint which must be exercised in judicial consideration of challenges to hospital administration:

> No court should substitute its evaluation of such matters for that of the Hospital Board. It is the Board, not the court, which is charged with the responsibility of providing a competent staff of doctors. The Board has chosen to rely on the advice of its Medical Staff, and the court cannot surrogate for the Staff in executing this responsibility. Human lives are at stake, and the governing board must be given discretion in its selection so that it can have confidence in the competence and moral commitment of its staff. The evaluation of the professional proficiency of doctors is best left to the specialized expertise of their peers, subject only to limited judicial surveillance. *The court is charged with the narrow responsibility of assuring that the qualifications imposed by the Board are reasonably related to the operation of the hospital and fairly administered. In short, as long as staff selections are administered with fairness, geared by a rationale compatible with hospital responsibility, and unencumbered with irrelevant considerations, a court should not interfere.* (Emphasis added.)

Petitioner urges that the Hospital Authority's consideration of the more extensive residency and internship training, and less restricted licensure, enabling physicians to treat the "whole patient", are irrelevant considerations, and that the Hospital Authority's decision was mere mechanical compliance with the due process notice and hearing requirements.

The difference in training between differing disciplines has been recognized, however, by this Court and most others as being of considerable relevance in determining professional qualifications. Indeed, training is one of those relevant professional qualifications "which may be constitutionally applied in determining the class of people who are eligible to practice medicine in a public hospital." *Foster v. Mobile County Hospital Board,* 398 F.2d 227, 230.

The courts and legislative bodies have drawn other discipline-based distinctions in the past which have survived appellate review. As recently as 1979 the Fifth Circuit was presented with a discrimination claim by optometrists who asserted that the reimbursement scheme of the Medicare Act was arbitrary and denied equal protection since the services of a doctor of optometry were not reimbursible while those of a doctor of medicine were.

The Fifth Circuit noted that in the face of Congress' conscientious effort to maximize Medicare's coverage for various healing professions, including a study of the desirability of extending Part B Medicare funds for services of additional types of licensed health practitioners and a study of the difference of levels of training, it could not be said that Congress acted irrationally in providing reimbursement distinctions between the diagnostic services provided by a medical doctor and those provided by an optometrist.

In considering the constitutional claim of irrational classification, where the optometrists claimed irrationality because the classification failed to account for overlaps of services performed by different classes of doctors, the Court stated: "This inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classi-

fications is neither possible nor necessary. *Massachusetts Board of Retirement v. Mungra,* 427 U.S. 307, 314, 96 S.Ct. 2562, 2567, 49 L.Ed. 2d 520 (1976); *Dandridge v. Williams,* 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed. 2d 491 (1976). Our power to overturn a statute, where fundamental interests or suspect groups are absent, is limited to the situation in which 'the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational. *Barry v. Barchi,* _____ U.S. _____, 99 S.Ct. 2642, 60 L.Ed. 2d _____ (1979), quoting *Vance v. Bradley,* _____ U.S. _____, 99 S.Ct. 939, 59 L.Ed. 2d 171 (1979). Accordingly, plaintiffs would raise a substantial constitutional claim only if they could show that Congress, in distinguishing between the diagnostic services provided by optometrists and doctors of medicine for the purposes of Medicare reimbursement acted irrationally.'

"[A]lthough there may be some overlap of diagnostic procedures of optometrists and opthalmologists, their training was sufficiently different to indicate that the funds of the Part B program could best be used by limiting reimbursement to optometrists.

"The failure to provide equal benefits to every conceivable interest in enacting reform legislation does not violate the equal protection clause." *Pushkin v. Califano,* 600 F.2d 489 (1979).

The Fifth Circuit again in *Berman v. Florida Medical Center, Inc.,* 600 F.2d 466 (1979), rejected an allegation that hospital bylaws were arbitrarily class-based when in fact they were lawfully discipline-based in a case hauntingly similar to the within case, which gives expression to some hypothetical consequences in the medical field should Dr.

Shaw's expanded view of "liberty interest" be adopted by this Court. The Court there held that:

> "[This] case locates Dr. Berman, (an osteopathic physician), not in any class of osteopathic as opposed to allopathic physicians, but in that merely of *physicians* who have not served an AMA residency but wish to practice a specialty in defendant's hospital without having done so. That they may have received equivalent training of another sort does not invalidate the hospital's requirement, which is a reasonable one. Doubtless there are midwives in the Fort Lauderdale area quite capable of handling normal childbirth, but this circumstance would scarcely render the requirement of a medical license for practice in this hospital unconstitutional or invalid. Having specified a reasonable means of access to its staff privileges, defendant is not required to shell the woods, canvassing one by one other modes that might or might not be its equivalent."

This Court has directly and eloquently addressed the discrimination claim presented by Dr. Shaw before. In *Hayman v. City of Galveston, et al.*, 273 U.S. 414 (1927), such differences in training and method of treatment between osteopathic and allopathic physicians were considered and the Court held:

> "We cannot say that a regulation excluding from the conduct of a hosptial the devotees of some of the numerous systems or methods of treating diseases authorized to practice in Texas, is unreasonable or arbitrary. In the management of a hospital, quite apart from its use for educational purposes, some choice in methods of treatment would seem inevitable, and a selection based upon a classification having some basis in the exercise of the judgment of the state board whose action is challenged is not a denial of the equal protection of the laws."

The reasoned decisions of the courts should not be ignored and the traditionally recognized management dis-

cretion of the local governing authorities undermined or abrogated simply on petitioner's bare conclusion that respondents made their decision without a rational basis. As observed by the trial court and the Fifth Circuit Court of Appeals:

> "[T]here remains a considerable amount of *disagreement within the medical community* as to the role which podiatrists should play in providing medical services to the American public. Evidently a temporary compromise was struck by the Joint Commission on Accreditation of Hospitals by permitting but not requiring hospitals to place on staff doctors in the *emerging area* of podiatric medicine." Shaw v. Hospital Authority of Cobb County, et al., 614 F.2d 946 (Emphasis added.)

II

In the first appearance of this case before the Fifth Circuit (Shaw I), Dr. Shaw litigated the same issue of equal protection of the laws that he sought to raise in the pleadings in the second civil action.

The majority opinion in Shaw I held that Shaw's equal protection claim was without merit. Specifically, the Court of Appeals concluded:

> "Under the equal protection claims, appellant attacks the classifications created by appellee's bylaws, arguing that all those licensed by the State of Georgia to practice the healing arts are members of one class. He contends that granting staff privileges to full-practice physicians and dentists while denying them to podiatrists creates classifications which have no rational basis. We believe that this argument is too attenuated. Such a class is too large to be meaningful and we are unable to equate the various branches of the healing arts which would necessarily be included. Therefore, we

> reject appellant's equal protection claim. The facts simply do not make out a case of persons similarly situated within the equal protection clause treatment requirement 'that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co. v. Virginia,* 1920, 253 U.S. 412, 415, 40 S.Ct. 560, 562, 64 L.Ed. 989, 991." *Shaw v. Hospital Authority of Cobb County,* supra at p. 627.

In so ruling, this Court specifically rejected Shaw's equal protection claim. No rehearing was requested, and the decision and judgment is the law of the case as to any issue of equal protection so litigated.

In *Diplomat Electronics, Inc. v. Westinghouse Electronic Supply Co.,* 430 F.2d 38 (5th Cir. 1970), it is stated that the determinations of law in a previous appeal will be binding on remand and in subsequent appeal unless clearly erroneous. 1B *Moore's Federal Practice,* Section 0.404(10).

In *Lehrman v. Gulf Oil Corporation,* 500 F.2d 659 (1974), the Fifth Circuit made the following observation: "[T]he 'law of the case' doctrine . . . plays an important role in subsequent appeals. This laudable and self-imposed restriction is grounded on the sound public policy that litiation must come to an end. An appellate court cannot efficiently perform its duty to provide expeditious justice to all if questions once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal."

The Fifth Circuit had previously recognized that though the Court has power to adopt a position different from that adopted on an earlier appeal, it would not do so in a case in which the appellants did not seek a rehearing or make application for certiorari with respect to the decision on the prior appeal. In *United States v. Dickinson,* 476 F.2d 373

(1973), it held as follows: "The determination which we make is that the prior opinion and decision of this Court established the law of the case from which we do not depart. Orderly judicial procedure requires that there be an adherence to a decision upon an earlier appeal of the same case. (citations omitted) Although the Court has power to adopt a position different from that of the earlier appeal, we are not persuaded that such action is required in this cause. It is to be noted that the appellants did not seek a rehearing or make application for certiorari of the decision on the prior appeal."

CONCLUSION

There is a distinction between the various disciplines of the healing arts which is very real, and to allow a governing board or legislative body to draw upon its common experience and wisdom and choose the services of the more extensively trained, experienced and recognized discipline over the less scientifically recognized one, is not prohibited discrimination. Respondents therefore urge that the petition for the Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX A

COBB GENERAL HOSPITAL
Department of Surgery-Anesthesiology

RULES AND REGULATIONS

ORGANIZATION

The Department of Surgery-Anesthesiology will include the following divisions: Anesthesiology, General Surgery, Neurological Surgery, Ophthalmology, Oral Surgery, Orthopedics, Otorhinolaryngology, Plastic Surgery, Protology, Thoracic Surgery, Traumatic Surgery, and Urology.

These rules and regulations will supersede any rules and regulations made by an specialty or subspecialty of surgery.

PRIVILEGES

Applicants desiring privileges as specialties in these divisions of the Surgery-Anesthesiology Department shall have met the resident training requirements for the particular specialty boards and be qualified to take examination for board certification. Board certification is desirable but not mandatory. The status for a candidate for privileges in the Surgery-Anesthesiology Department shall be determined by the Credentials Committee based on the usual requirements for Staff membership plus one of the following: (a) certification of the American Board of General Surgery, or surgical specialty; (b) full membership in American College of

Surgeons with a specialty or general surgery; (c) shall have met the resident training requirements for general surgery or the particular specialty board and be qualified to take examination for board examination. Full privileges allows one to perform all procedures under his chosen specialty. A surgeon is expected, however, to perform only those procedures that are consistent with his skill and degree of training.

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Defendants-Appellees.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief of Respondents in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were mailed, postage prepaid, as follows:

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This _____ day of October, 1980

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